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No. 86-724 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

HERAEUS-AMERSIL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DAVID M. COHEN
JOSEPH I. LIEBMAN
JOHN J. MAHON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether imported merchandise may be classified at a higher tariff without following the 30-day notice and publication requirements of 19 U.S.C. 1315(d) where a court, rather than the Secretary of the Treasury, has determined that there was an "established and uniform practice" of classifying that kind of merchandise at a lower tariff and the importer had actual notice that the Customs Service has abandoned its earlier classification practice.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 795 F.2d 1575. The opinion of the Court of International Trade (Pet. App. 19a-31a) is reported at 617 F. Supp. 89. The previous opinion of the Court of International Trade (Pet. App. 34a-46a) is reported at 600 F. Supp. 221.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on July 8, 1986. A petition for rehearing was denied on August 1, 1986 (Pet. App. 18a). The petition for a writ of certiorari was filed on October 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Heraeus-Amersil, Inc., imports fused quartz and fused silica into the United States (Pet. App. 3a). From 1968 through November 1977, the Customs

Service classified all of petitioner's imports under the provisions of the Tariff Schedules of the United States covering certain "glass in the mass" and similar products and "glass tubing" and similar products (*ibid.*). In December 1977, however, the Customs Service determined that such merchandise should be classified under a different provision covering "optical glass" and retroactively applied the new (and higher) tariff rate to merchandise that had been imported between March and December 1976 (*id.* at 3a-4a). Later, the Customs Service also applied the higher tariff rate to merchandise that petitioner imported in April 1981 (*id.* at 4a).

2. Petitioner filed timely administrative protests concerning each application of the higher tariff rate (Pet. App. 4a). The Customs Service denied the protests (*ibid.*). Accordingly, petitioner filed suit in the Court of International Trade, alleging, inter alia, that the Customs Service had a "uniform and established practice" of classifying this merchandise at the lower tariff and that the Customs Service was therefore precluded from reclassifying petitioner's imports until it complied with the 30-day notice and publication requirements of 19 U.S.C. 1315(d). Pet. App. 4a-5a. The United States responded, inter alia, that the court lacked authority to determine whether any such "established and uniform practice" existed and that the matter should be remanded to the Secretary of the Treasury to make the necessary findings (*id.* at 5a.).

The court held, contrary to the argument of the United States, that it had authority to determine whether an "established and uniform practice" of classifying particular merchandise existed (Pet. App. 24a-27a, 38a-43a). Moreover, it agreed with petitioner that the Customs Service's practice over a 10-year period of consistently classifying petitioner's merchandise under the same tariff provision constituted an actual "established and uniform practice" notwithstanding the Secretary's failure to make

an administrative "finding" to this effect (*id.* at 25a-30a). But the court rejected petitioner's "further contention that Customs is bound *ad infinitum* by a now discontinued 'established and uniform practice' unless Customs publishes notice of the change in classification practice" (*id.* at 30a). The court reasoned that "[a]doption of [petitioner's] position could lead to the absurd result of allowing importers to go back through the records, find long-discontinued 'established and uniform practices' and protest classifications accordingly, in total disregard of what everyone involved knows is the current position of Customs regarding the merchandise" (*ibid.*). Accordingly, the court held that, since "[petitioner] was on actual notice of the change in classification practice as of December 30, 1977" (*ibid.*), the "entries made before December 30, 1977, must * * * be reliquidated" (*id.* at 31a), but the "entries occurring after December 30, 1977" need not be reliquidated (*ibid.*).

3. On appeal by both the United States and petitioner, the Federal Circuit affirmed (Pet. App. 1a-16a). It agreed with petitioner that, "[c]ontrary to the United States' postulate that an established and uniform practice arises upon only a formal finding by the Secretary * * *, the courts have consistently made such findings where the actual existence of a uniform practice was at issue" (*id.* at 9a-10a). Likewise, it found that the Court of International Trade had "properly held that [petitioner] successfully proved the existence of an established and uniform practice" (*id.* at 12a). Finally, the Federal Circuit rejected petitioner's contention "that the established and uniform practice of liquidating the merchandise under [the lower tariff rate] cannot be changed until publication pursuant to [19 U.S.C.] 1315(d)" (*id.* at 13a), finding that "it was not the intent of Congress when it enacted the 1315(d) notice provision that, where the Secretary (though requested) failed to decide whether an established and uniform practice

existed and that determination had to be made by the court, the lack of a published notice in the Federal Register would bar the application of an administrative change in rates even though the affected importer was specifically informed that Customs had changed its practice" (*id.* at 15a). The court reasoned that "[t]he words of 1315(d)—which relate solely to a change in duties found by the Secretary to have been imposed under an established and uniform practice—do not so provide" (*ibid.*), and that there is "no sufficient reason why Congress would have desired substantially to prolong use of a formerly-employed rate known by the particular importer to have already been abandoned by Customs * * *" (*ibid.*). Accordingly, the court held that "the Court of International Trade [had] correctly determined that the entries entered before December 30, 1977 must be reliquidated * * * but not those entries entered after December 30, 1977" (*id.* at 16a (footnote omitted)).

DISCUSSION

The court below correctly held that the Customs Service could apply a higher tariff rate to merchandise that petitioner imported long after December 30, 1977, when petitioner had actual notice of the revised classification. That holding does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner principally contends (Pet. 5-7) that, under the governing statute, the Secretary of the Treasury may not change *any* practice found to be "established and uniform" until he publishes a notice of intent to do so in the Federal Register. This contention is incorrect.

The statute provides only that "[n]o administrative ruling resulting in the imposition of a higher rate of duty or charge than *the Secretary of the Treasury shall find* to have been applicable * * * under an established and uniform practice shall be effective * * * prior to the

expiration of thirty days after the date of publication in the Federal Register of notice of such ruling" (19 U.S.C. 1315(d) (emphasis added)). The statute thus precludes the Secretary from changing a tariff without publication only where the Secretary has made a "finding" that an "established and uniform practice" was in existence. See *Commonwealth Oil Refining Co.* v. *United States*, 480 F.2d 1352, 1360-1361 (C.C.P.A. 1973); *Martin Brokerage Co.* v. *United States*, 36 Cust. Ct. 35, 39, C.D. 1750 (1956). Here, of course, it was the Court of International Trade which determined that an "established and uniform practice" existed. Accordingly, on its face, the statute does not preclude the Secretary from applying a higher tariff rate to petitioner's merchandise.

Nor does the purpose of the statute require that the Secretary be precluded from imposing a higher tariff in these circumstances. The publication requirement acknowledges "that the importing community relies upon the existence of established and uniform practices in conducting their business" (Pet. App. 13a). Thus, "[i]f the Secretary makes a finding that an established and uniform practice has existed, the Secretary should not revoke that practice prior to publication of notice to that effect in the Federal Register" (*id.* at 13a-14a). "By that means, the Secretary's change in the pre-existing practice (as he has established it or found it to be) is made known to all importers throughout the country" (*id.* at 14a). "Similarly, where an established and uniform practice has been judicially found (because Customs refused to pass on that issue) * * * the importing community should be afforded a grace period to permit it to make business decisions in light of any new agency action changing that practice" (*ibid.*). But requiring the Customs Service to apply "the rate in existence at the time the merchandise was imported * * * until notice of the change is given" accomplishes this purpose (*ibid.*). It ensures that the importer is not charged a tariff of which it does not have advance notice.

In contrast, requiring the Secretary to follow the publication requirement when a court, rather than the Secretary, determines that an "established and uniform practice" existed would have a deleterious effect on the administration of the customs statute. "If we accepted [petitioner's] point that it is entitled to the application of lower rates until Customs complies with the 1315(d) notice provision of publication in the Federal Register, [petitioner] could receive a windfall because the lower (putatively incorrect) rate would apply to the April 1981 merchandise even though [petitioner] knew of Customs' change in classification three years earlier" (Pet. App. 15a (footnote omitted)). Indeed, "[a]doption of [petitioner's] position could lead to the absurd result of allowing importers to go back through the records, find long-discontinued 'established and uniform practices' and protest classifications accordingly, in total disregard of what everyone involved knows is the current position of Customs regarding the merchandise (*id.* at 30a). This clearly is not a tenable interpretation of the customs law. See generally *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 318 (1933).

Finally, petitioner errs in suggesting that (Pet. 6) the customs law must be interpreted in this fashion to ensure that it has an opportunity to comment on the Secretary's change in "established and uniform practice." Petitioner is not entitled to any such opportunity for comment. 19 U.S.C. 1315(d) does not require the Secretary to solicit comments of interested parties; it merely requires the Secretary to publish a notice that he intends to change an established and uniform practice that he has found to exist. 19 C.F.R. 177.10 does provide that interested parties shall have an opportunity for comment; however, 19 C.F.R. 177.10 is applicable only where the Customs Service has itself created an established and uniform practice by published ruling. See *Rank Precision Industries, Inc.* v. *United States,* 660 F.2d 476, 480 n.11 (C.C.P.A. 1981).

The Customs Service has not published any such ruling here. Accordingly, even if the court had by mandamus ordered the Secretary to "find" that an established and uniform practice existed, as petitioner requested (Pet. 6), petitioner would not have been entitled to any opportunity for comment.

2. Petitioner suggests (Pet. 8-10) that the decision below violates the constitutional and statutory requirement that the treatment of imports be uniform, but that contention is doubly inappropriate in this case. First, the merchandise involved in this case is imported at only two ports in the United States. See Pet. App. 3a, 12a & n.11. Since nothing in the record indicates that any other importers at these two ports have been treated any differently from petitioner, either as to the timing of their receipt of actual notice or as to the classification of their imports, there is no evidence of actual nonuniformity. Second, the decision below holds only that petitioner cannot complain of the classification of its goods on the ground of failure to publish the statutory notice. It does not preclude any importer from challenging the new tariff rate as substantively invalid for any reason, including nonuniformity of application. The decision below expressly left open the question whether the new tariff is substantively valid. See *id.* at 16a n.16.

3. Finally, petitioner's contention (Pet. 10-13) that the decision below conflicts with decisions requiring agencies to explain departures from prior agency practice is sophistic. The United States argued throughout this litigation that the courts lack authority to determine initially whether an "established and uniform practice" exists. The United States asked that the case be remanded to the Secretary so that he could consider whether an established and uniform practice existed in this case and, if so, explain why and whether a change is warranted. Petitioner urged the courts to decide whether an established and uniform

practice existed. It is because the courts followed petitioner's urging that the Secretary has had no opportunity to explain why and whether a change is required. Moreover, the court below expressly stated that petitioner "remains free to challenge the correctness of [the new rate] on its own merits, if proper protests have been filed" (Pet. App. 16a n.16). Thus, no intervention by this Court is required to ensure that the Secretary provides an explanation concerning why a new tariff is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DAVID M. COHEN
JOSEPH I. LIEBMAN
JOHN J. MAHON
Attorneys

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